No. 87-2098

(10)

In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES H. BURNLEY, IV, SECRETARY OF TRANSPORTATION, APPELLANT

v.

MID-AMERICA PIPELINE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOINT APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 86-C-815-E

MID-AMERICA PIPELINE COMPANY, PLAINTIFF

vs.

ELIZABETH H. DOLE, DEFENDANT

TRANSCRIPT OF HEARING ON CROSS MOTIONS FOR SUMMARY JUDGMENT HAD ON MARCH 25, 1987

Before The Honorable JOHN LEO WAGNER, Magistrate

APPEARANCES:

For the Plaintiff:	Mr. Richard McMillan Crowell & Moring
For the Defendant:	Mr. Jim Gardner Department of Justice
Also Present:	Ms. Barbara Betshuk Department of Transportation

ELDON R. SIMPSON
United States Court Reporter

PROCEEDINGS

[2] COURT CLERK: Case Number 86-C-815-E, Mid-America Pipeline Company versus Elizabeth H. Dole. Would counsel please enter their appearance into the record?)

MR. MCMILLAN: Richard McMillan, Your Honor, with Crowell and Moring, here representing the plaintiff.

MR. GARDNER: Jim Gardner with the Justice Department in Washington for the defendant, and with me is Barbara Betshuk with the Department of Transportation.

THE COURT: How do you spell your name, please?

MS. BETSHUK: B-E-T-S-H-U-K.

THE COURT: All right. Mr. McMillan, you fired the first shot here on your—

MR. MCMILLAN: —first shot here. Your Honor, we're here to determine, as you know, whether or not the Constitution imposes a limitation on Congress's power to delegate the taxing authority. It's an issue of separation of powers. It's an issue of separation of two principal powers; the power to spend on the one hand, which has always been a function of the executive agency of government, and a power to raise revenue, on the other, which has always been a function for Congress. And to us, that's very much a function of principle. That's why we're here, and I'll be candid in telling you—if you haven't figured it out already—that it's not the size of this particular tax that's troubled us. [3] And in fact, to be honest about it, the reason we're here is—the gentleman on my right, Mr. Fred Isaacs, is the president of Mid-America Pipeline—just doesn't like the way that this thing has kind of been handled. He thinks you ought to call a spade and spade, and if it's a tax, you ought to call it a tax, and if it's a tax, it ought to be Congress that assesses it and not an admini-

strative agency like the Department of Transportation that doesn't have any specialization or any particular expertise at all in that area.

So we're here to talk about principles, constitutional principles, and I'll do my best to be as candid with Your Honor as I can and to answer whatever questions you have, because I'd like to see—I think we'd all like to see this case resolved on the basis of an honest look at the constitutional principles and make sure that we get to the right bottom line the right way.

I'm going to talk about three basic issues. The first is what is a fee. I think Your Honor has probably read about that at some length in our briefs. I don't think, at least I hope there won't be much dispute about that, and I don't expect to spend a lot of time on it, but I will certainly respond to any questions you've got on that issue.

The second issue is did the Supreme Court really mean to hold that the taxing power can't be delegated in the same [4] way that every other garden variety legislative power can be delegated. And I won't spend a whole lot of time on that issue, too. I will go through some of the cases, and I think we'll come out on that issue with a rather clear understanding from the cases and commentators that indeed that's precisely what the holding was, which gets me to the third issue which I think is the real issue, and it's the difficult issue you're going to have to decide.

And that is, given that there is a constitutional limitation, if you find that, what is—what is the nature of the constitutional limitation on the delegation of taxing power and has it been violated here? And I'll try and devote the bulk of my argument to that latter point.

Before I do, though, let me, as I say, briefly address the first two issues, and let me begin with the fee/tax distinction.

THE COURT: Let me say, I've read the briefs—

MR. MCMILLAN: Okay.

THE COURT: —and I've read if not all, at least a majority of the cases cited in the briefs at this point. And I'm fairly well that under these circumstances what we're dealing with here is a tax and not a fee. I'm really at this point in my analyisis grappling more with your third area of inquiry than I am the remainder of it. I think there is a limitation on the delegation—on the power of Congress to [5] delegate the taxing power. I think this was in fact a tax.

What I'm grappling with at this point, after a review of your briefs, is whether or not under these circumstances the delegation exceeded the limits that ought to be properly imposed. In other words, there's no doubt that the Congress established this tax. This is not something that was initiated through the rulemaking authority of the agency itself. This statute is a statutory matter enacted by Congress, and certainly the collection of the tax was delegated to the Department of Energy. Now, to the extent that that delegation went beyond the collection of the tax to those issues that I think both sides have identified, who is to be taxed, how much is to be taxed, when they are to be taxed, does that—do those types of decisions constitute a constitutional infringement? That's where I'm focused at this point.

MR. MCMILLAN: That's where I'm focused, too. I think we're in agreement on what the right issues and the wrong issues are. Let me, I guess then, just pass over the fee/tax distinction. I think we have covered that in our briefs, and I would like to respond if the government raises something surprising in their argument, but let's move to the second issue of the three I mentioned, because I think dealing with the second issue helps to illuminate the third issue in a way that hopefuly will be helpful.

[6] The government has suggested that National Cable does not really stand for the proposition that there is any constitutional limitation, other than kind of normal delegation doctrine limitations on the power of the Congress to delegate the taxing authority, and I think that that is demonstrably incorrect for basically three reasons.

The first reason is that National Cable rewrote a statute. That's as kind of straightforeward as I can put that proposition. And to understand it, it's useful to kind of think about the standards for statutory construction that would otherwise have governed this proceeding. Standards like you're bound by the statutory language first and foremost, and ought to do your best not to do violence to that language, and if there is a question about it, you ought to consult the legislative history and the intent of Congress. And third, you certainly shouldn't read out of the statute relevant portions of it.

But in this particular case, there is specific language in the statute to the effect that the agencies should take into account, quote, "public policy or interests served and other pertinent facts," which the Supreme Court not indirectly but quite explicitly read out of the statute, and they could only read that out of the statute if it was predicated on a constitutional proposition. And so the holding of the case demands that we find that there was a [7] constitutional requirement that certain facets of that statute be changed.

And point two is that's specifically what the Supreme Court says it's doing. It says there are constitutional problems here. It says we're going to revise the statute because of the constitutional problems, not because of some rule of statutory construction or anything of the sort.

So we know from looking at the holding and the language of National Cable that there is a specific limitation. We also know that the Supreme Court doesn't spell

out in every respect exactly what that limitation is, and that's the third point we're going to get to in a minute. But before we do, it's useful to look at how the other courts around the country have reacted to National Cable, what sort of interpretation have they put on the issue of what limitation is imposed by the Constitution as that case demands, and I thought I would just direct the Court—the Magistrate's attention specifically to the three brief quotes, which I think I—if Your Honor wouldn't mind, I'll just read. Each is about a sentence long.

The first is from the Phillips Petroleum case, which is a recent Tenth Circuit case, at 86 F. 2d 370, and I'm reading from page 375, which states, quote, "In National Cable Television Association versus FCC, the Supreme Court reviewed the IOAA and determined that agencies had authority to charge [8] fees to recipients of quote, 'special benefit', but that agencies could not tax such recipients". That's a statement by the Tenth Circuit of what they thought National Cable was holding.

And if we go to the D.C. Circuit, if I can quote from National Association of Broadcasters versus FCC, and now I'm at 554 F.2d at page 1129, the D.C. Circuit has the following to say: "In this connection it should also be noted that National Cable, as part of the basis for its opinion, relied on Article One, Section One of Section Eight, Paragraph Eighteen of the Constitution, in holding that taxation is an essential legislative function that Congress cannot abdicate or transfer to others. Once agency charges exceed their reasonable attributable costs"—which is a term they're using in terms of—does it relate to a specific benefit that's being received by the specific recipient—"Once agency charges exceed their reasonable attributable cost, they cease being fees and become taxes levied not by Congress but by an agency. This the cases hold is pro-

hibited." So that's a second recent illustration of how the courts have interpreted National Cable, and I will just try one more, and there are others—

COURT CLERK: Mr. McMillan, excuse me.

MR. MCMILLAN: Yes.

COURT CLERK: If you'll wait a moment, I need to [9] change tapes.

MR. MCMILLAN: Sure.

(Tape changed)

MR. MCMILLAN: All right. The third case I'd like to quote from, Your Honor, is the Fifth Circuit decision in Mississippi Power and Light, and I'm quoting from 601 F. 2d at page 227, quote, "Broadly construed, the IOAA could have been interpreted to permit federal agencies to recoup their entire cost of regulating, a result which would offend the constitutional mandate that only Congress has the"—and then it quotes from the Constitution, " 'power to levy and collect taxes' ".

So, if we ask ourselves the question does National Cable specifically impose a constitutional limitation on the power of Congress to delegate the taxing authority and had the court so interpreted National Cable that way, I don't think there is any question but that the answer to that is yes.

And that brings us to the issue which is at the heart of this case, which is, what is the nature of that limitation.

And there are basically three possibilities that Your Honor will have to choose among and perhaps variations, but I think that these are the basic three.

The first is a finding as some of the courts I've just quoted have suggested, that the taxing power is special and should not be delegated at all to allow specialized [10] agencies to be—

The second possibility is that the taxing power is special, that it can nevertheless within meaningful restraints be

delegated, but that that delegation should never reach the fundamental issues of who's going to be taxed and how much they're going to be taxed.

The third possibility is one Your Honor would have to make up and would have to do with some lesser degree of restraint on the delegation power. I'm not sure what that would be. We've suggested to Your Honor that if you start drawing the line in kind of a fuzzy way that says, "Congress, you can delegate the taxing power, but please be careful about it", and that's all, that you're going to have a lot of delegation of this fundamental power in a way that we find objectionable.

And so with that in mind, let me go back through these three possibilities, and let's talk about which of them make the most sense. And I'll be candid with Your Honor and say right now that I think the first one makes the most sense. We'd like to see a bright line drawn. We don't see a reason why Congress needs to delegate to an agency like the DOT, before I—

THE COURT: If you draw the bright line at that stage, and here I'm calling to mind the argument put forth by the government regarding the IRS. Certainly the IRS is a [11] branch of the executive portion of government, and they certainly formulate regulations and—that have some determination as to who will be taxed, and, in connection with that, how much they will be taxed with regard to income taxation. Were we to adopt your bright line in this first category you've outlined, how do we accommodate the rather vast body of law that has put its stamp of approval on the delegation to the IRS?

MR. MCMILLAN: Well, let's be careful when we say on the delegation to the IRS. One thing that isn't in dispute here is the notion that, as Your Honor suggested at the outset, someone can be charged with the collection function and certain administrative functions. That's not dele-

gating the power to make taxes. That's delegating kind of a collection function which the IRS clearly performs and which we would have no problem with the DOT performing for that matter. That doesn't entirely answer your question, but I think it's fair to say that – that there probably are the following additional two points that do answer your question.

First of all, the IRS plays an interpretive role in tax policy, and to illustrate the difference between the IRS role and perhaps the DOT role, let me hand up to Your Honor something we prepared this morning, and I've only given it to counsel immediately before the argument, and he has not had a real opportunity to look at this very carefully and for sure [12] if he has problems with it or wants to make some comment about it afterwards, we would have no objection. But what we did is take information we had available for some pipelines – and we only had information available for a few, and so this is in a sense an arbitrary selection of a few pipelines for which we had information available. And we assumed that there would be a total tax collected of a thousand dollars. And then on the basis of that assumption we calculated what the tax on each of these companies would be, assuming that DOT selected tax based on miles, which is one of the options they have, or a tax based on volume miles or barrel miles, which is the second option they have, or a tax based on gross revenue, which is the third option they have, and they are given a fourth option of, quote, "some combination of the foregoing".

As Your Honor can see, we're not talking about minimal intepretive functions with respect to how much this company or that company is going to be taxed. We're talking about a situation where if you look at Mid-America and Colonial, which are the two – the second and third

pipelines here, if you chose a tax based on miles, Mid-America's percentage of the total is twenty-eight percent, and Colonial's is eighteen percent, two hundred and eighty-three versus one hundred and eighty-four. But if you change the measure to one of the other acceptable standards—and note that DOT has total discretion to decide which is the best—[13] you see that Mid-America's tax goes down to five percent; Colonial's goes up to seventy-one percent. That is a radical swing that is a function of DOT's exercise of discretion. And I don't think that the IRS is asserting those sorts of large determinations about how much people get taxed.

You're talking about an International Revenue Code that's passed by Congress that says very specifically you're going to get—each person is going to get taxed fifteen percent, or twenty-eight percent, or thirty-three percent. You're going to get deductions for moving expenses, for this, that, and the other thing, and at the end of the day your tax is going to be computed in precisely this manner, and it is true that it is a complicated code and that sooner or later, because of the esoterics of all the different taxpayers, you need to get a specialized agency like the IRS into the act to interpret exactly what moving expenses means, to interpret what it means in the context of a particular fact pattern.

But we're not talking about interpretation here. There's no issue as to what volume miles means or miles means. We're talking about a fundamental decision about how much Mid-America should be taxed versus how much Colonial should be taxed. And that's a fundamental decision that Congress ought to be making, that there's no reason to have DOT make.

The other thing I would say is that I don't think Your Honor should even reach the IRS issue in your opinion.

[14] To me, what we have in National Cable, and the New England Power case, and the series of cases is a very clear statement that when you're talking about nonspecialized DOTs and FCCs, people made up of old railroad men, and old communication men, and this, that, and the other, there is fundamental requirement that the taxing power not be delegated. I think that—that requirement applies to the IRS as well. I don't think the IRS violates it. But I don't know what is in the intricacies of two thousand pages of the IRS Code, and I don't think Your Honor ought to reach that issue at this point and start making decisions about what National Cable means to the IRS. I think they are entirely squarable. But I don't think it's an issue which the Supreme Court reached in National Cable, and I don't think it's an issue which Your Honor should reach here.

I guess I've said, via this chart, what I want to say with respect to the second of the two possibilities, that is, if Congress can delegate this power to the DOT, they ought at least not to be permitted to delegate but who's going to be taxed and how much is going to be taxed to an agency like the DOT. They ought to at least not be able to do that. And because they have very clearly gone beyond that, if that's the test, if that's the standard Your Honor avows, it can be delegated, but the limits are, "Congress, you decide and how much and let the agency do some interpretation in other [15] things", then this statute violates that proposition and ought to be thrown out on that basis.

But, as I have said, we are not urging Your Honor to go to that second position. We are fundamentally urging Your Honor to stay with what we've described as a bright line. And I guess I'd like to summarize the reasons why I think that that clear statement, that it makes sense.

Some of the reasons are admittedly kind of technical reasons. They are reasons such as the cases. There are

cases, three of which I just quoted, which say that delegation of the taxing power is prohibited. If you go back to those quotes and others, you will find in the cases statements that National Cable means that, that that's what we ought to hold National Cable to be, that it's prohibited, period.

You will find commentators who reach the same conclusion, both that National Cable says that and that National Cable ought to say that, that the taxing authority is a special function, that it has never been delegated in two hundred years and it ought not to be delegated now. So there are cases and there are—is scholarship that supports the proposition that it shouldn't be delegated at all.

I'm confident that in a few minutes government counsel is going to stand up and say, "Your Honor, there hasn't been a statute struck down in fifty years on the basis of delegability doctrine". And putting aside for a moment, [16] although I'll get back to it, the proposition that that's flatly incorrect, the fact of the matter also is that for two hundred years, Congress never tried to delegate the taxing power. It was always understood, and the understanding was acted upon, that that power wasn't going to be delegated in the first place, so that the notion that the delegation of other powers haven't been struck down is perfectly beside the point when you talk about two hundred years of uninterrupted history, uninterrupted, I should add, until thirteen years ago, where, contrary to the implication of the government's nothing has been struck down in fifty years statement, National Cable was decided. And National Cable specifically says that we're going to strike this down because of constitutional problems, which have to be separation of powers problems. So there just oughtn't to be any question about the proposition that there is responsible and respectable authority out there and scholarship out there for the bright line test.

Having said all of that, this is ultimately one of those unusual cases which is probably not a function of scholarship. We're not talking about a principle that's complicated, or arcane, or is the subject of discussion by professors. We're talking about a subject that every person that you could walk out the door right now and run into has an opinion about. It's just that fundamental. It's a basic [17] notion about whether or not the taxing power in a democracy ought to be delegated to unelected people who would be very difficult to even find within the halls of the Department of Transportation or some other federal bureaucratic agency.

And when you look at the issue from that standpoint, you see that this becomes, even though the DOT safety program is just a little first step, a first example, you see that it becomes kind of a most fundamental issue that any of us could face. It is the issue of whether or not the separation of the spending power and the separation of the taxing power should be preserved. And that in a sense is just about all that the government does, in one sense. They raised money, and they spend money. And as soon as we adopt a rule of law that says the executive departments of government can bring unto themselves not only the power to spend it but to tax for it as well, then there is a fundamental loss of the control, and really the only control we have, over those federal agencies. And without getting too philosophical about it, there is a fundamental thing that Justice Douglas identified as being at the heart of our Constitution, which he didn't think was appropriate.

Let me make one other final point, and then I'll close. I think it's important to recognize exactly what's going on with this particular tax. We are dealing with only one tax here this morning, and on a grand scale it's a [18] relatively modest size. But since we filed our initial brief, a second

agency has adopted user fees, and it's only a matter of time before others do as well.

The reason for that is very simple political reality, which we all read about in the newspapers. We've got a tremendous deficit. We've got a balanced budget act, Graham-Rudman, and we've got an administration and many people in Congress who don't want to raise taxes. And that creates a real dilemma for Congress. It creates real pressure to find the easy way out, just wiggle off here or sneak out of the constitutional requirements there, and they will do it, because that's the way Congress acts, unless somebody puts a stop to it right now.

And so less anybody think that we're dealing with one little program, we're dealing with a proposition that Your Honor is probably going to be the first to decide but which other courts are going to decide sooner or later and which is going to be a fundamental proposition of whether or not when Congress taxes it calls a tax a tax and does it directly or whether it sneaks it in through an agency without competence to assess the taxes in a way that no one knows about and in a way for which Congress can't be held responsible.

We would urge Your Honor to adopt a bright line test and to hold that under National Cable the taxing power shouldn't be delegated, period. Thank you.

[19] THE COURT: All right. Thank you. Mr. Gardner?

MR. GARDNER: Good afternoon, Your Honor. I would like to begin with the issue as he framed it at the start of the hearing and focus on the—Mr. McMillan's third point as to the limits of the delegation doctrine and if they've been exceeded in this case.

Mr. McMillan was absolutely right that I would stand up here and the first thing I'm going to say is that no court in fifty-two years has struck down a statute on the grounds

that it was an improper delegation of congressional authority. And I don't think that's important as an interesting historical fact or that that is in itself a persuasive reason to rule one way or the other. What is important—what's important about it is that it's indicative of something. It's indicative of the fact that it is—the constitutional standards for congressional delegation of authority are very minimal. They're easy to meet. And because they's easy to meet, over—since—not since 1935 has Congress actually stepped over the bounds.

THE COURT: Now, you say delegation of authority. That may very well be the case, but I distinguish between the delegation of authority and the delegation of this taxing power. Certainly, as we all know, there have been a vast amount of delegation of authority to various agencies in terms of rulemaking, and the birth of administrative agencies has [20] been phenomenal. And that's largely because we live in a very complex society, and there's lots of problems, and there's a limit to what Congress can do. And so in order to accommodate the work load, it's necessary to formulate all these different regulations. And all you need to do is look at the CFR to see the type of activity that has been ongoing.

But that—that to my mind is different. There's been addressed here an issue that's been couched in terms of a fundamental constitutional issue involving separation of powers. And rather than get bogged down so much in the delegation of authority—certainly there is valid delegations of authority—let's try and focus on the delegation of this taxing power to an agency.

MR. GARDNER: Fine, fine. In that case, let me frame the question for you like this. What's at issue in this case is the constitutionality of a statute, and that is important, because I think the plaintiff's are trying to paint this as

though the agency has gone off—has gotten a wild hair and has gone off and just started taxing people. That's not true. There is a congressional statute on the books. The statute—the only way the statute can be obeyed is for the Department of Transportation to go out and assess what we're calling here a tax. However, you know from our briefs we think it's a fee. I won't—I will address the issue you'd like to hear about though.

[21] So Congress has directed this, and the question before the court is, assuming that this is a tax, has Congress in enacting this statute, delegated improperly the taxing power. Now, the issue has been framed in two ways for us by the plaintiffs. One, they say the taxing power is simply nondelegable, period.

There is no authority for that, Your Honor. The taxing power is one of dozens of powers that's listed in Article One, Section Eight of the Constitution. Like all those powers, it's subject to the necessary and proper clause which says that Congress can pass all laws necessary and proper to execute its enumerated powers. There is no asterisk in the Constitution after the word "taxes" with a footnote that says by the way, this is the only power here that's nondelegable. So there's nothing in the text of the Constitution or even in the, you know, the structure of it that would indicate that the taxing power should be different. And the Supreme Court has held exactly that. And that is a point I really want to stress.

There is a case directly on point. It's the Hampton case. We've cited it in our brief. In that case, the plaintiffs raised the same argument that's raised here. They said you can't delegate the taxing power. And the Court said that's not the case. The taxing power is like all the other powers. The authorities, the delegation authorities make no [22] distinction, was their language, and they held that it could be delegated. In fact, they gave a number of

reasons why Congress might properly want to delegate it. And those reasons were, for example, if Congress had to sit around and fix every rate on every tax and pull out their calculators and dot every I and T and do all the arithmetic, they would not have time for any other functions. And the Supreme Court recognized that. As we said, the rationales behind the delegation doctrine are practical rationales. Congress can't do everything, especially nowdays with a country of two hundred forty million people, the biggest economy in the history of the world. It's essential for them to be able to delegate certain powers, certain authority, and –

THE COURT: Let me ask you this, because I think your argument here makes a lot of sense. Mr. McMillan's main problem with the statute as it reads is that it allows the agency to determine how much different pipelines are going to be taxed by virtue of its determination what the tax will be based on, either miles or pipeline, or barrel miles, I guess the number of mile barrels or the measure of liquids being pumped through pipelines, or in gross revenues, and that this results in various discrepancies.

What Congress did here is it gave the agency really four different choices. So there was a decision to be made here that amounted to choosing choice A, B, C or D. Now, to [23] my mind, that is not the type of decision that results in thousands of subdecisions to be made, the crossing of Ts, the dotting of every I that you refer to. But it's simply a relatively simply [*sic*] multiple choice, you circle the one that you want to be used.

So in that regard, although I think your argument does make a lot of sense, I'm having difficult in applying it to this particular situation.

MR. GARDNER: Okay. Well, let me see if I can help you out. I think it's ironic that the plaintiffs have seized

on the multiple choice aspect of this, as you say, has shown that it's a—that it's an improper delegation. In fact, what it shows is exactly the opposite, that Congress has given an unusual amount of guidance to the agency. The language of the statute itself, Section 7005(A)(1), says, "The Secretary of Transportation shall establish a schedule of fees based on the usage in reasonable —", and then it goes into the multiple choice, in reasonable relationship to the three things, and then, "of natural gas and hazardous liquid pipelines." Now, I would say to you, if all Congress had said is the secretary shall establish a schedule based on the usage and—based on the usage of natural gas and hazardous liquid pipelines, in other words, omit the multiple choice, if they had said that, without specifying any way in which the agency could implement that, that would still be within, well within [24] the scope of permissible delegation under the standards of Hampton and American Power and Light. And I'll get to those in a second and tell you exactly what those standards are.

But the fact that Congress didn't just say to establish a schedule fee—of fees for gas and hazardous liquid pipelines but said also, "and there are only three ways that you can do it. In the entire universe of possible administrative choices, you may only make three, because those are the only three that we deem to acceptably implement our will", and it enumerates them.

Now, the standards in Hampton, in the Hampton case the Court said all that Congress has to do is lay down an intelligible principle. That's it. In the American Power and Light case, which we've also—we've cited both these cases in our—they said essentially the same thing. They've said that Congress—delegation is proper if Congress, number one, identifies the agency that's to implement their will; number two, states the general policy that they want the

agency to pursue; and number three, outlines or defines the boundaries of the delegating authority. That's it. Those are the only requirements as the Supreme Court has stated them.

And here we have far, far more than enough to meet those minimal standards. First of all, this statute, unlike the IOAA, which was at issue in National Cable I might add, this statute names the agency.

[25] All right. We're one third of the way there already, just having done that. Number two, the policy, the purpose of this statute is made abundantly clear. What the agency is to do is to establish fees that are related to pipeline use, and it says, the statute in Section C says—limits, says exactly what the funds can be used for, so there's no question about that. And Section D says exactly that—the absolute ceiling that can be raised, so—

THE COURT: The policy implemented here—

MR. GARDNER: Uh-huh.

THE COURT: —or defined by Congress in the statute, or at least as I divine it to be, is raise enough revenue to pay for your own operations. Isn't that basically what the purpose of this statute was? To have the agency raise enough revenue to cover its own operations, which to my mind is precisely the policy stated in the IOAA. In other words, the policy there was also raise enough revenue—or you're permitted to raise enough revenue to cover your own operations.

The problem I have with that, and the problem frankly I have with this statute, is that in interpreting the IOAA, the Supreme Court specifically said the limitation in the ways that you can raise revenue—first of all, there is a limitation, and that is that you can only do that by way of fee. And the fee is defined as being a special benefit. In [26] other words, you can only raise revenue or make assessments or impose fees, however you want to say it, when

you grant a special benefit—to my mind, that is a, very much a word of art—to the industry or the business, whoever is being forced to pay.

In that case, they—or the cases that have interpreted that for the most part, they have determined that in fact there have been special benefits which have accrued. Some of the cases talk about special benefits in connection with a general public benefit. But it seems to hinge on the agency's ability or execution in defining that special benefit.

Now, what has happened here, appears to me to have happened here, is that with this same sort of mandate, in other words raise revenues to cover your own costs of operation, the agency has imposed these users' fees without identifying any special benefit accruing to those being asked to pay the fees or the taxes. Under the decision of the Supreme Court in National Cable, it appears to me that what that is then is a tax. And I have some difficulty in that context or in that framework of calling it anything else other than a tax and escaping the conclusion that what's happening here is that the agency, with congressional approval no doubt, had stepped across that line to what the Supreme Court has clearly said is impermissible and unconstitutional. I don't [27] think that there's any problem with the agency raising revenue and perhaps even raising revenue that would cover its entire scope of operations, the cost of operations. But doing that without identifying a special benefit accruing to that industry or those companies being asked to pay the revenue seems to me to cross that line. So that's my concern.

MR. GARDNER: I understand your concern, and I think the way to satisfy it is to take a look at the plaintiff's arguments and also at National Cable.

Let me go back to the point I started. Having decided that this is a tax and not a fee doesn't get you anywhere.

Okay. It doesn't get you anywhere, because Congress has the constitutional authority to assess fees, and it has the constitutional authority to tax. The very first sentence—or the first sentence of the second paragraph of plaintiff's opening brief says we concede that Congress has the power to tax. Of course they concede that. There is no question about it. So whether it's a tax or a fee doesn't get them anywere. What gets them someplace is if it's an unconstitutional statute by virtue of an improper delegation.

National Cable did not speak to that, and there is a case that was brought to my attention only yesterday, or I would have cited it in my brief, and I would like to bring it to the court's attention now. It's called Aeronautical Radio, and the citation is 335 F.2d 304, and that is a Seventh [28] Circuit case from 1964 in which the Seventh Circuit considered the issue that the Supreme Court did not decide in National Cable. The issue that the Supreme Court did not decide in National Cable was whether the IOAA was an overly broad delegation of congressional authority. The Seventh Circuit did decide that, and they decided that the IOAA was not an overly broad delegation of congressional authority, despite the fact that it doesn't name what agency should carry out the congressional policies, despite the fact that the policy behind it is extremely vague and the language is cryptic, despite the fact that under the IOAA an agency had the option to impose fees or not.

THE COURT: Now, this is a 1964 case—

MR. GARDNER: Right.

THE COURT: —out of the Seventh Circuit.

MR. GARDNER: Right.

THE COURT: National Cable, of course, was decided in 1974, ten years later.

MR. GARDNER: Absolutely.

THE COURT: And interpreted the same statute. And it seems to me, although National Cable did not—the Court did not come right out and say this is an unconstitutional statute, what they did, in effect, was rewrite the statute so as to make it constitutional, and did so specifically stating we're doing this in order to avoid the constitutional [29] problems. Now, to cite a 1964 case out of the Seventh Circuit and say that that somehow impacts that, I have trouble seeing where you're going.

MR. GARDNER: I'm—I'm—I'm not going to cite that. I'm not citing it to be authoritative at all. Obviously, it's from a different circuit, so you can ignore it if you want. I think the reasoning there is interesting and perhaps persuasive, and that's the only thing that I'm citing it for.

As far as National Cable goes, I think it is incorrect to say that the Supreme Court rewrote the statute. What they did was they looked at what—let me tell you what I think they did in National Cable. They looked at the statute. They said this statute is very vague. This statute seems to give almost unbounded discretion to an agency to impose taxes or do whatever it wants. If we are forced to consider the validity of this statute, we might have to strike it down as an unconstitutional delegation. We don't want to have to do that. Our way out is to construe the statute narrowing, not rewrite it, but to construe the statute narrowly based on our reading of the legislative history.

And if you'll look at the last couple of pages of the National Cable case, what the Court says is, it focuses on a particular piece of the language of the IOAA. That's the piece where the statute says one of the things that agencies [30] should consider is the value to the recipient. And this phrase, value to the recipient, is sort of the genesis of the National Cable opinion. The Court homed in on that, it looked at the legislative history, and it said ah-ha. We can

effectuate the intent of Congress with this statute as written if we recognize that what Congress really meant with this statute was that agencies should charge fees on the basis of the value to the recipient. And that's what the IOAA means. And if we read it that way, then of course it's not an overly broad delegation of authority. And that's how the Court avoided the constitutional issue and also spawned this statutory interpretation of the IOAA where the value to the recipient, the statutory language, that particular phrase, becomes very, very important for assessing a fee under the IOAA.

THE COURT: Now, when you say value to the recipient, you're talking about the recipient of the special services—

MR. GARDNER: Right.

THE COURT: —to the entity or individual—

MR. GARDNER: Right.

THE COURT: —paying the fee.

MR. GARDNER: Right.

THE COURT: All right. This is where I'm hanging up.

MR. GARDNER: Okay.

THE COURT: Because under this particular statute [31] that we're dealing with here, there doesn't appear to be any value to the recipients. In other words, there isn't any recipient. All there is is somebody who is being required to pay an assessment, but it isn't—doesn't strike me as being a situation where—which we traditionally think about and which the case said construed as a fee. We're talking about a user's fee, but we're talking about companies who are using their own pipelines, are paying for the maintenance of their own pipelines. Unless you could say that the companies are using these agencies for something—and my understanding is all the Department of Transportation or the Department of Energy is doing here is regulating these

pipelines, that there are not any particular permits or certificates or certificates of convenience and necessity that are obtained from this agency that is necessary in order for these companies to remain in business.

So, you know, we go—and I agree with you, that the Court is hung up on value to the recipient or some special benefit. If there is no special benefit here, if there is no value to this particular recipient, where do we go from there?

MR. GARDNER: Well, okay, where we go from there is at the most—the worst conclusion for the government that you could draw from that is that this is a tax and not a fee. As I said before, and let me just, you know, make it perfectly clear we think it's a fee, and we think it's a fee under [32] Massachusetts versus United States, we think it's a fee under National Cable. You have our arguments.

But suppose you reach that worst conclusion for the government that it's a tax. All right, it's a tax. Still, you know, we have the text of the statute here, and it's—okay, it's going to be a tax, and still the only constitutional challenge that the plaintiffs are raising is whether it's an improper delegation of the taxing power.

Now, the taxing power can be delegated. If it couldn't be, as you mentioned to Mr. McMillan before, we'd have a big problem with the IRS. We'd have to shut them down.

THE COURT: Well, it seems we're going back around here, then, this distinction of what are we delegating here. We're delegating some function to this agency in connection with the raising of revenue. And I'm going to call that, the revenue being raised, a tax, going to do it by virtue of the tax, because I'm pretty well convinced from a review of these cases that at least the weight of authority would be that under these circumstances what we're dealing with is a tax. And I think I do counsel a disservice if

I've pretty much come to that conclusion, and based on the arguments which I've read, if I ask you to go over all that again. And rather let you spend your time in those areas where there is still some question, at least in my mind.

Then aren't we back down to what are we doing here? [33] Are we making—are we making taxing decisions? In other words, a decision that's necessary inherently that can only be exercised in connection with a taxing power, or are all we doing here is collecting the tax and interpreting the power that has already been exercised? In other words, all we're doing here is providing definitions of those words or those terms which—which have been defined by Congress need further definition. And that's where I am right now. What is this agency doing?

MR. GARDNER: Okay. There is a difference, an important difference between delegation and abdication. And it's a difference that the plaintiffs are fudging. Nobody here is going to stand up and say Congress can abdicate its power, any power. It can't. And that's what those nondelegation cases, Schector Poultry and all those say.

But that hasn't happened here. Congress has not abdicated its taxing power, again assuming that this is a tax. What—the way that you framed the question for me, Your Honor, is—is that Congress has exercised its taxing power. That's what this statute is. It's a tax on pipeline usage.

Now, the fact that Congress gave, you know—okay, how do we analyze that? The Supreme Court has given us guidance. It's given us guidance in the Hampton case where it told us that all we need to find in order to sustain the statute is an intelligible principle. Well, I would submit [34] that the intelligible principle, the minimum intelligible

principle that's required here is met by the—by the nature of the statute itself. The principle is there shall be a tax on pipeline usage.

Now, if that's all that Congress had said, under the Hampton decision this would be a constitutional statute. If Congress had said there shall be a tax on pipeline usage that shall cover pipelines that transport hazardous liquids in interstate commerce, that would be a permissible delegation of congressional—of the congressional taxing power. But Congress has gone so much farther here. They've said who's going to be taxed. They've identified those people with great care by incorporating by reference the provisions of the hazardous liquid and natural gas pipeline safety acts which define with enormous precision who is going to be subject to regulation. And that definition is incorporated here. So they've said who's going to be taxed.

They've said how much is going to be taxed. In Section D of the statute, it provides that Congress, through its appropriation process, will set the limit on how much can be raised by this fee. They have gone farther. They have said what the money can be used for in Section C of the statute. And they've confined its uses to certain very narrow areas that—again, by reference to these natural gas and hazardous liquid acts.

[35] So, you know, is this a proper delegation, is this a permissible delegation within the meaning of Hampton and American Power and Light. Absolutely. It goes much, much farther, the statute does, in detail, than Congress needed to go.

And Mr. McMillan told you Congress doesn't need to delegate this to DOT. Congress has no reason to let DOT decide these things. But that's not the issue. The issue is not whether Congress had to do this, or whether they

needed to do this, or whether there was a good reason for them to do it, but they did it, and the question is was it constitutional. And I think the court need not look any further than the Hampton and American Power cases to conclude that it is constitutional.

THE COURT: Okay, thank you.

MR. GARDNER: Can I just add one point? In terms of this chart, I would like to, for the moment, object to this. It's—as I understand, it's based on hearsay, and there's no foundation, and since it's not admissible in evidence it's improper to consider under Rule 56, summary judgment motion. But what I will do is study it, and if I can stipulate to the figures here, I will do so. That's it, if you have no more questions.

THE COURT: The objection to this exhibit will be sustained at this point. Not that that's any indication of [36] any great momenta in summary judgment motion. The point of the exhibit I think was made in briefs before this was even submitted, that due to the different methods set out by Congress of implementing this tax, that there would be a great disparity between particular pipeline companies, depending on which method was used, and the amount of the funds to be paid by each particular company. And I—frankly, I got the point prior to looking at the chart. So—

MR. MCMILLAN: Your Honor, I don't want to prolong this unnecessarily, so let me just make a couple of brief remarks. I'd like to very briefly say something about Hampton, very briefly say something about government counsel's point that Congress has decided how much the tax is going to be, and finally refer Your Honor to the Tenth Circuit decision in Nevada Power, which I think is constructive on various of the issues.

With respect to Hampton, the notion that somehow Hampton, which was decided in 1928, supersedes National

Cable, which was decided in 1974, is precisely wrong given the fact that National Cable cites Hampton, it deals with Hampton. It deals indeed with both Hampton and Schlector, which is the 1935 decision that stands for the proposition that some powers can't be delegated at all. And National Cable holds very specifically that one of the two—one of two things is possible. Not—one of two things is true; either it can't [37] be delegated at all under Schlector, or it can be delegated only within confined limits not met by the statute here under Hampton.

Hampton, if you read it, is entirely consistent with National Cable, in the sense that that was a custom fee situation. In Hampton, you got—you paid a custom duty for the privilege of importing. And on the facts, there's simply no conflict between the decisions. And given the fact that National Cable deals with Hampton, I don't think that's—there's much more to be said about that.

The important issue which Your Honor has already focused on, correctly, I think, if I can put it in the context of what government counsel has just said, is that we need not be concerned here particularly with the fact that Congress has decided how much the industry shall be taxed. We're not here worrying about what the industry should be taxed. We're interested in what Mid-America is going to be taxed.

Congress has made a decision that was exactly the same decision they made in National Cable and New England Power; namely, recover all of your costs from industry. The problem and the reason why this is a delegation of the taxing power is that Congress has turned over to the DOT the issue of how much will Mid-America pay. And it isn't a slight variation that we're talking about. There are profound differences in how much we're going to pay, and it is strictly [38] a function of DOT's discretion.

The third point I'd like to make is I'd like to refer Your Honor's specific attention the Nevada Power Company versus Watt case, which is 711 F. 2d—

THE COURT: I've got it in front of me.

MR. MCMILLAN: That's an instructive case, because in that case the Court wasn't dealing with the IOAA. In that case, like this case, they were dealing with a different statute, a new statute that purported to give the agency specific authority to charge the regulated companies certain amounts of money for certain things. And let me just quote two of the Court's specific holdings, both of which are holdings that apply National Cable to this other statute.

The first is on page 931, on the right-hand column, where the Court, right before the heading "retroactive application", tells the Interior Department to go back, recalculate what we're talking about here, and take into account the, quote, "warning in National Cable and New England Power that an applicant may not be charged for work relating to the agency's general cost of administration".

And on the—two pages later, on page 933 in holding number fifteen, it says Interior may, consonant with National Cable, do certain things. Cover the full cost of services provided to the company, et cetera [*sic*]. But in the next—in the two sentences later, it says Interior may not charge Colorada [*sic*] [39] Ut. with general management costs and other expenses not incurred in agency action relating specifically to Colorado Ut.'s application", citing the Mississippi Power decision.

Nevada Power stands specifically for the proposition that when Congress passes a new law that attempts to delegate the taxing authority to a federal agency, the constitutional principles enunciated in National Cable prevent that delegation and require it declared unconstitutional if it

does certain of the things described in this opinion. I think that's precisely the analogous fact pattern we have here, and we hope Your Honor will rule in favor of our motion.

THE COURT: Thank you. Does the government have anything further?

MR GARDNER: Since you've given me the opportunity, let me just say one thing that I said before, because I just want to make sure that the court keeps in mind the distinction between delegation and abdication. Even Schector Poultry, which was one just referred to, did not hold that Congress can't delegate its authority. It didn't hold that at all. It said that Congress can't abdicate its authority. And I think if we keep that in mind, that what is impermissible is an abdication, and what is or may be very easily permissible is a delegation, then I think that will draw the right distinction for the court and will show that this statute is constitutional. Thank you.

[40] THE COURT: Anything further?

MR. MCMILLAN: No, Your Honor. Thank you.

THE COURT: Well, I think we've had a pretty good hearing here on the merits. I will—do want to commend counsel for both sides. I thought the briefs in this case were excellent and enjoyed reading them. I think the arguments have been good also, and we've got a pretty good focus at this point.

Although it's my usual practice to try and announce decision from the bench, given the magnitude of the issue there, I'm not going to do that, but I will issue a written report and recommendation to Judge Ellison and hopefully get it out fairly promptly, although I try never to make any promises in that regard.

Very well. We stand in recess.
(Recess)

* * * * *

A TRUE AND CORRECT
TRANSCRIPT.

CERTIFIED: /s/ ELDON R. SIMPSON
Eldon R. Simpson, C.S.R.
U.S. Court Reporter

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Wednesday, July 16, 1986 / Notices

Research and Special Programs Administration

Pipeline Safety User Fees

This notice states the policies and practices that the Research and Special Programs Administration (RSPA) has established to carry out the pipeline safety user fee provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("the Act") (Pub. L. No. 99-272; April 7, 1986) for fiscal year 1986. The Act requires that gas and hazardous liquid pipeline operators pay annual user fees to fund the cost of the Department's pipeline safety program. The fees are to be assessed and collected during each fiscal year before the end of the fiscal year.

The Act provides that the persons liable for the fees are those that operate (1) gas transmission lines subject to the National Gas Pipeline Safety Act of 1968 (NGPSA) (49 U.S.C. 1671 *et seq.*), (2) liquefied natural gas (LNG) facilities subject to the NGSPA, or (3) pipeline facilities subject to the Hazardous Liquid Pipeline Safety Act of 1979 (HLPSA) (49 U.S.C. 2001 *et seq.*) Gas transmission lines subject to the NGPSA are covered by the RSPA gas pipeline safety standards in 49 CFR Part 192. They include interstate and intrastate pipelines carrying natural gas, flammable gas or gas which is toxic or corrosive. Safety standards for LNG facilities subject to the NGPSA are contained in 49 CFR Part 193. The hazardous liquid pipeline facilities that are subject to the HLPSA include interstate and intrastate pipelines carrying petroleum, petroleum products or anhydrous ammonia. These pipelines are regulated under 49 CFR Part 195. Pipelines transporting other liquid substances could at some future time become subject to the user fee provisions of the Act if RSPA determines that the pipeline transportation involved poses an unreasonable risk to life or property and issues safety standards for that transportation under the HLPSA.

Fee Schedules

The Act requires that the Secretary of Transportation establish a schedule of fees for pipeline usage, bearing a reasonable relationship to miles of pipeline, volume-miles, revenues, or an appropriate combination thereof. Also, the Secretary must take into account the allocation of Departmental resources in establishing the schedule.

To help decide upon an appropriate basis for determination of fees, in April RSPA consulted the pipeline industry's major trade associations: The American Petroleum Institute, the American Gas Association, the Interstate Natural Gas Association of America, and the Association of Oil Pipe Lines. The consensus was that pipeline mileage provides the most reasonable basis for determining fees to be paid by operators of gas transmission lines and hazardous liquid pipeline facilities. After further consideration, RSPA adopted pipeline mileage as the fee basis.

For gas transmission lines, mileage data are available from the transmission and gathering system annual reports, which 49 CFR 191.17 requires operators to file by March 15 each year. Each report provides the miles of transmission lines each oeprator has at the end of the calendar year for which the report is filed. For the fiscal year 1986 user fee assessments, RSPA will use the mileage submitted in the 1984 calendar year report, because the data in the 1985 reports are not yet in useable form. RSPA expects that a similar practice (use of year before last calendar year data) will be applied to assessments in subsequent fiscal years, because most likely, the receipt and computerized tabulation of annual report data will lag behind the need for user fee mileage data.

For hazardous liquid pipelines, RSPA does not have mileage data, because liquid pipeline operators have not

been required to report this information. Therefore, through direct correspondence, RSPA has asked operators of pipelines subject to the HLPSA to submit mileage data. The data collected will serve as the fee basis for fiscal year 1986. For use in later fiscal years, RSPA plans to adopt an annual reporting requirement for hazardous liquid pipelines, which would provide data such as pipeline mileage.

A fee basis other that mileage is needed for LNG facilities. For these facilities, RSPA decided that storage capacity is the most readily measurable indicator of usage as well as allocation of RSPA resources. The storage capacity of each LNG facility that is subject to the user fee provisions of the Act is published in a report by the Liquefied Natural Gas Committee of the American Gas Association titled "LNG 1983-84 Report" (January 1986). RSPA has used data from this report for fiscal year 1986 assessments.

With storage capacity as the basis, a five step fee schedule was developed for LNG facilities. It provides an appropriate means of relating the fees to usage and resource allocation, taking into account the wide spread (approximately 900:1) in facility storage capacities. The schedule is set forth below under "Assessments."

Assessments

The Act provides that the fees received for any fiscal year may be as much as 105 percent of the appropriation for that fiscal year for activities authorized by the NGPSA and the HLPSA. The amount Congress appropriates annually for the pipeline safety program therefore would normally be the bench mark for the total amount of fee assessments.

Because at this point in this fiscal year RSPA can more accurately determine the costs of the program, RSPA will

assess total fees for fiscal year 1986 that will not exceed the projected fiscal year 1986 expenditures plus a 5 percent allowance.

Each operator of jurisdictional gas transmission lines or hazardous liquid pipelines will be assessed a share of RSPA's total pipeline safety program costs in proportion to the miles of transmission or hazardous liquid pipelines that person had in service at the beginning of fiscal year 1986. Total (liquid and gas) program costs include administrative expenses (salaries, travel, printing, communication, supplies, etc.), regulatory, enforcement, training and research costs, and State grants-in-aid. This total, not including grants, has been allocated 80 percent for gas and 20 percent for liquid, based on the fiscal year 1986 budget submission to Congress. Grants will be allocated 95 percent for gas and 5 percent for liquid. In making the gas transmission assessments, the total gas program costs will be reduced by approximately 5 percent to account for LNG program expenditures as explained below.

Each operator of an LNG facility in service at the begining of fiscal year 1986 will to be assessed a designated share of the LNG program costs based on the storage capacity of the facility. For FY-86 these costs are estimated to be approximately 5 percent of the total gas program costs. This percentage represents the approximate ratio between the allocation of resources to LNG facilities and the total allocation of resources to all gas facilities.

Therefore, gas transmission line operators will be assessed according to the following formulas:

Total gas program cost = (80%) (total program cost − total grants) + (95%) (total grants)

Total transmission user fees = (105%) (Total gas program cost) − Total LNG User Fees

$$\text{Assessment per mile} = \frac{\text{Total transmission user fees}}{\text{Total miles}}$$

Operator Assessment = Assessment per mile × Operator miles

For FY-86 the Gas Transmission Pipeline Assessment per mile is $23.99.

Hazardous liquid pipeline operators will be assessed similarly:

Total liquid program cost = (20%) (Total program cost − total grants) + (5%) (total grants)

Total liquid user fees = (105%) (Total liquid program cost)

$$\text{Assessment per mile} = \frac{\text{Total liquid user fees}}{\text{Total miles}}$$

Operator assessment = Assessment per mile × Operator miles

For FY-86 the Hazardous Liquid Pipeline Assessment per mile is $6.41.

The total user fees for LNG facilities will be calculated as follows:

Total LNG user fees equal approximately (105%) (5%) (Total gas program cost)

For FY-86 LNG operator assessments will be as follows:

LNG Facility storage capacity	Operator assessment
Less than 10,000 bbl.	$1,250.00
10,000 bbl. but less than 100,000 bbl.	2,500.00
100,000 bbl. but less than 250,000 bbl.	3,750.00
250,000 bbl. but less than 500,000 bbl.	5,000.00
500,000 bbl. or more	7,500.00

Exemption of Small Mileage Operators

A review of the operator mileage data and assessment fees showed that there were 23 percent of the gas operators

with less than 10 miles of pipelines subject to the user fee. These operators averaged 4.25 miles which would result in an average assessment of approximately $100. Similarly, 17 percent of the liquid operators had less than 30 miles of pipelines. These operators averaged 12.29 miles which would result in an average assessment of approximately $80.

It has been estimated that the administrative costs associated with each user fee assessment would approach if not exceed these average assessment amounts, resulting in a zero dollar benefit. Therefore, RSPA has reached an administrative decision to exclude from assessment operators of less than 10 miles of gas transmission pipeline and operators of less than 30 miles of liquid pipeline.

Charges by State Agencies

A few State agencies (most notably the California State Fire Marshal) that participate in the Federal/State cooperative program to enforce the Federal pipeline safety standards are charging pipeline operators to fund the cost of State programs. Some operators may feel that the new Federal user fees for pipeline facilities in those States will unfairly duplicate the program charges the States are making. There should be no duplication, however, if a State's charges are not more than necessary to meet the State's share of the State pipeline program costs, since the State's share is not part of the costs to be funded by Federal user fees. The cost of a State's pipeline safety program is reduced by any amount it receives in Federal-grant-in-aid funds. If a State's charges are not to exceed its program costs, those charges should be reduced by an amount equal to the grant funds received, less State administrative costs assignable to managing those funds.

Collection Procedures

Assessment notices to all known operators of assessable facilities will be mailed in the latter part of July 1986, stating the operator's pipeline mileage or LNG storage capacity, as appropriate, and the fee that is due. Payments in full must be received no later than 30 days after the date notice is mailed. Each operator will be asked to pay by certified check or money order payable to the U.S. Department of Transportation, and identified as payment of the pipeline user fee. Payment should be sent to the address stated in the assessment notice. All monies received will be transmitted to a special account at the U.S. Treasury.

The RSPA Register of User Fees will review each user fee payment and notify an operator if any irregularity is discovered.

Payments not received by the due date will be subject to allowable interest charges (31 U.S.C. 3717). Follow-up demands for payment and other actions intended to assure timely collection, including referral to local collection agencies or court action, will be conducted in accordance with the Federal Claims Collection Standards (4 CFR Chapter II) and Departmental procedures.

Adjustments

As stated above, fiscal year 1986 fees for gas transmission line operators will be based on calendar year 1984 mileage data. For LNG facilities, fees will be based on storage capacities published in "LNG 1983-84 Report." Fees for hazardous liquid pipeline operators will be based on information currently being collected from operators or otherwise available. An operator who believes it is being overcharged because the mileage of LNG storage capacity stated in the assessment notice exceeds the mile- of pipeline or LNG storage capacity that operator had in

service at the beginning of fiscal year 1986 (October 1, 1985) may request a fee adjustment at the time of payment. Requesting a fee adjustment does not relieve the operator of the obligation to pay the full amount of the assessment. The Register of User Fees will resolve each request for adjustment. Adjustments will not be made for pipeline or LNG facilities removed from service during fiscal year 1986. Also, because each assessment is for usage "reasonably related" to mileage (capacity), adjustments will not be made for minimal difference in mileage (capacity). Adjustments will be made by subtracting the recognized overcharge from the fiscal year 1987 assessment.

Public Participation

RSPA invites interested persons to participate in the development of policies and practices to be followed in making user fee assessments for fiscal year 1987 by commenting on any of the topics in this notice. Although the policies and practices described in this notice are final for purposes of fiscal year 1986 assessments, all comments received will be considered in determining whether the fiscal year 1986 policies and practices should be continued, modified, or replaced for use in fiscal year 1987. A notice announcing the policies and practices for fiscal year 1987 assessments will be published in the **Federal Register** in the fall of 1986.

Interested persons should submit comments in writing, identifying the title of this notice, by September 2, 1986 to the Director, Office of Pipeline Safety, U.S. Department of Transportation, 400 7th Street SW., Washington, DC 20590. Comments received after that date will be considered so far as practicable.

Issued in Washington, DC on July 11, 1986.

Robert L. Paullin, *Director, Office of Pipeline Safety.*

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Research and Special Programs Administration

Pipeline Safety User Fees

This notice states the policies and practices that the Research and Special Programs Administration (RSPA) has adopted to implement the pipeline safety user fee provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Reconciliation Act) (Pub. L. No. 99-272; April 7, 1986). The policies and practices are in effect for fiscal year 1987, which began October 1, 1986. They will also apply to ensuing fiscal years unless changed by further notice.

Background

Section 7005(a)(1) of the Reconciliation Act requires the Secretary of Transportation (whose responsibility in the matter is executed by RSPA) to establish "a schedule of fees based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof, of natural gas and hazardous liquid pipelines." The Secretary is to "take into consideration the allocation of departmental resources" in establishing such schedule. Procedures for the collection of fees must be established under section 7005(a)(2).

According to section 7005(a)(3) of the Reconciliation Act, the fees are to be assessed to persons operating:

(A) All pipeline facilities subject to the Hazardous Liquid Pipeline Safety Act of 1979 [HLPSA] (49 U.S.C. app. 2001 *et seq.*); and

(B) All pipeline transmission facilities and all liquefied natural gas [LNG] facilities subject to the jurisdiction of the Natural Gas Pipeline Safety Act of 1968 [NGSPA] (49 U.S.C. app. 1671 *et seq.*).

However, under section 7005(c) the use of the fees collected is restricted to "activities" authorized by these two safety statutes. Thus, the fee assessments are limited to persons who operate pipeline facilities that are subject to RSPAS's pipeline safety regulations. In category (A) above, these facilities include those interstate and intrastate pipelines carrying petroleum, petroleum products, or anhydrous ammonia covered by 49 CFR Part 195. Category B includes interstate and intrastate natural gas transmission lines subject to 49 CFR Parts 191 and 192, and liquefied natural gas facilities to which 49 CFR Part 193 applies. Because the jurisdiction of the HLPSA is broader than the current scope of Part 195, if RSPA were to issue regulations under the HLPSA for liquid pipeline facilities not now covered by Part 195, the operators of these facilities would then become liable for user fees. Such facilities might include pipelines carrying liquids not now classified as hazardous under Part 195; pipelines carrying petroleum, petroleum products, or anhydrous ammonia by gravity or at a stress level of 20 percent or less of the specified minimum yield strength of the pipe; and terminal storage facilities associated with hazardous liquid pipelines.

On July 16, 1986, RSPA published a notice in the **Federal Register** (51 **FR** 25782) announcing its user fee policies and collection procedures for fiscal year 1986. Adopting an alternative permitted by the Reconciliation Act, RSPA established the fee schedule for pipelines as a pro rata share of total program costs based on the number of miles of pipeline (gas transmission or hazardous liquid) each operator had in service at the beginning of fiscal year 1986. The mileage of gas transmission lines was determined from calendar year 1984 annual reports filed in accordance with Part 191. Adjustments were permitted for any overcharge due to mileage discrepancies between

calendar year 1984 and fiscal year 1986. The current mileage of hazardous liquid pipelines was determined by operator inquiry.

The Reconciliation Act sets a limit on fee assessments of 105 percent of fiscal year appropriations. However, for fiscal year 1986, user fees were based on 105 percent of projected total program costs, since these costs could be accurately determined at the time of assessment, which was late in the fiscal year. In accordance with the directive to consider the allocation of departmental resources, total program costs were divided 80 percent for gas and 20 percent for liquid, less the costs of State grants-in-aid, in accordance with fiscal year 1986 budget estimates.

Thus allowing for the 95 percent/5 percent authorized split of appropriated grant-in-aid funds between gas and liquid State programs and the 5 percent of gas program costs allocable to LNG activities, the fiscal year 1986 fee schedule for pipelines was as follows:

User fee per mile equals Gas (liquid) pipeline user fees divided by Total gas transmission (liquid) miles

Gas pipeline user fees equals (1.05) (gas program costs) minus Total LNG user fees

Liquid pipeline user fees equals (1.05) (liquid program costs)

Gas program costs equals (.8) (Total program cost minus total grants) plus (.95) (total grants)

Liquid program costs equals (.2) (total program costs minus total grants) plus (.05) (total grants)

To save disproportionate collection costs, operators with less than 10 miles of gas transmission lines or 30 miles of hazardous liquid pipelines were exempted from any fee assessment.

The user fee schedule for LNG facilities was established on the basis of storage capacity and number of LNG plants.

LNG facility storage capacity (bbl.)		Number of plants	Operator assessment
At least	But less than		
	10,000	22	$1,250
10,000	100,000	16	2,500
100,000	250,000	18	3,750
250,000	500,000	24	5,000
500,000	.....	14	7,500

This schedule resulted in a reasonable distribution of total fees, which were determined approximately as follows:

Total LNG user fees equals (1.05) (.05) (Gas program costs)

Public Participation

The relatively short time between enactment of the Reconciliation Act (April 17, 1986) and the deadline for collection of fees (September 30, 1986) made it impracticable for RSPA to provide a suitable period for public comment before the policies and practices for fiscal year 1986 fee assessments were formulated and adopted as final. In its notice of fiscal year 1986 policies, RSPA did, however, invite interested persons to comment on them to help determine whether they should be continued, modified, or replaced for use in fiscal year 1987.

RSPA received written comments from 33 persons on its policies and practices for assessing user fees. Most of the comments came from pipeline companies in the form of a protest letter accompanying payment of the fee and objecting to any assessment of a user fee. The others, from pipeline companies, trade associations, and State agencies, were in response to the invitation to comment included in the notice.

Assessing Local Distribution Companies

About 40 percent of the commenters objected to assessment of fees against intrastate pipelines that are under the safety regulatory jurisdiction of a State agency. Of this group, some contended that Congress did not intend to impose pipeline user fees on local gas distribution companies. They based their arguments on the legislative history. In particular, an excerpt from House Report 99-300 was cited, wherein at page 497 the Energy and Commerce Committee (the Committee) states the following with reference to a Committee print which formed the basis for the pipeline user fees provision of the Reconciliation Act:

> In addition, under paragraph (a)(2), the Secretary may establish such procedures as are necessary for ease of administration and to prevent inefficient, duplicative, or counter-productive collection costs. The Committee expects that DOT will not ordinarily impose user fees on local distribution companies. Some of these companies are so small that the cost of collecting the fee may equal or even exceed the company's fair share of total program costs. Moreover, to the extent that transmission pipelines serving them lawfully pass on user fees to them in their rates, local gas distribution companies are in reality contributing to DOT's safety program costs.

These commenters focused attention on the Committee's expectation that "DOT will not ordinarily impose user fees on local distribution companies." Of course, even when viewed out of context, "not ordinarily" does not mean never, leaving room for assessment in some cases. When viewed in its proper context though, it's clear that the Committee had something in mind other than wholesale exemption of local distribution companies. The Committee was concerned that the Secretary's collection proce-

dures be designed to minimize the costs of collecting fees. This RSPA did by exempting from assessment operators with less than 10 miles of transmission lines. Had the Committee intended that all local distribution companies be exempt from paying fees, it certainly could have included in the bill specific language that would have exempted them, but it did not.

Furthermore, the Reconciliation Act, as reported out by conference and enacted, eliminated much of the discretion the Committee originally provided the Department in its bill in regard to imposition of fees. In the Act the scope of assessment was narrowed to operators of transmission facilities and LNG facilities. Based on a reasonable reading of section 7005(a)(3) of the Reconciliation Act, which clearly imposes fee liability on persons that operate all pipeline transmission facilities, RSPA does not agree that Congress intended to exclude local distribution companies from user fee assessments. Section 7005(a)(3) further supports this conclusion by extending liability for fees to operators of LNG facilities. Most of these facilities are operated by local distribution companies.

Another argument often raised by local distribution companies was that the fee assessments were unfair, since they would have to pay twice; once directly, and then indirectly when their gas suppliers, the interstate transmission companies, pass their assessments to them in the form of increased rates. Although it is not a foregone conclusion that all assessments to interstate transmission companies will simply be passed to local distribution companies and industrial customers, RSPA believes that this is a likely result. However, it is equally likely that any costs passed through to the local distribution companies will in turn be passed on to their customers, the consumers of gas. This ability of local distribution operators to pass fee

costs to consumers significantly lessens the alleged inequity of having to pay twice.

In considering this fairness issue, RSPA notes that Congress left the Department little discretion in making assessments, by declaring which facilities are subject to user fees. Furthermore, Congress was aware of the fairness issue. As reported on page 494 of House Report 99-300, the Committee recognized RSPA's concern about "whether it would be fair to assess fees against just the largest users." In addition, the Committee recognized the General Accounting Office view: "We believe that it is equitable for interstate pipeline operators and their customers to finance DOT's safety inspections, because the risks that these inspections reduce are entirely created by the pipeline operations." (It is important to understand that the customers of interstate pipeline operators that GAO thought it equitable to assess are to a very large extent local distribution companies). The Committee resolved the equity concern by concluding that "imposition of such fees would be an extremely small financial burden on pipeline operators, and customers."

Pipeline Transmission Facilities

A few local distribution companies also argued that the "transmission lines" in their systems are not the type of "pipeline transmission facilities" that Congress intended to subject to user fees. They said that their pipelines only meet the structural definition of "transmission line" for reporting purposes under Part 191 (i.e., operates at a hoop stress of 20 percent or more of specified minimum yield strength). Accordingly, they do not meet the functional aspects of the definition (i.e., transmit gas from production to storage or between storage fields, or for making wholesale sales). (The definition of "transmission line" is

contained in the instructions for completing the Annual Report for transmission and Gathering Systems, Form RSPA 7100.2-1, which under 49 CFR 191.13 must be filed with RSPA by operators of intrastate distribution systems that contain transmission lines. The same definition appears in 49 CFR Part 192.) These commenters, however, did not explain how the structural versus functional distinction is significant under the Reconciliation Act and RSPA can discern no significance.

In the absence of a definition of "pipeline transmission facilities" in the Reconciliation Act or any discussion of the meaning of the term in the legislative history, RSPA applied the established regulatory definition of "transmission line." Applying the term in this way constitutes a reasonable interpretation of its meaning. It also facilitates the administration of users fees by enabling RSPA to use available mileage data for transmission lines. Considering that fees collected from operators of "pipeline transmission facilities" are to fund RSPA's activities under the NGPSA, it is fair to assume Congress meant the term to be applied consistent with the terminology of regulations issued under the NGPSA.

Jurisdiction Over Intrastate Pipelines

Some commenters who operate intrastate pipelines that are under the safety jurisdiction of a certified State agency argued that these pipelines are not legally subject to pipeline user fees because they are not subject to the NGPSA or the HLPSA. The notion that these pipelines are not under the jurisdiction of the NGPSA or the HLPSA comes from a provision in each statute which excludes them from DOT's authority "to prescribe safety standards and enforce compliance with such standards." (49 USC app. 1674 and 2004).

The purpose of this provision, however, is to allow certified State agencies, rather than DOT, to enforce the Federal safety standards against intrastate pipelines under State jurisdiction. It by no means removes these intrastate pipelines from DOT's general regulatory authority under each statute. This general regulatory authority includes the power to issue safety standards applicable to intrastate pipelines that are later adopted and enforced by certified State agencies, the power to issue and enforce hazardous facility orders against intrastate pipelines, the authority to collect information or require accident reports from operators of intrastate pipelines, and the authority to inspect intrastate pipelines to monitor the performance of certified State agencies in enforcing compliance with the Federal standards. Inasmuch as intrastate pipelines under the enforcement authority of a certified State agency still come under the NGPSA or HLPSA for these gener regulatory purposes, and DOT conducts activities to carry out these purposes, the user fee assessments against these intrastate pipelines are legitimate under the Reconciliation Act.

Relating Fees to Grants-in-aid

Some intrastate operators and State agencies contended that DOT user fees for intrastate pipelines were unfair because they were not assessed in proportion to DOT's share of State enforcement costs as represented by the grant-in-aid payments to the State. These commenters were concerned that in States that pay more of their enforcement costs than other States, because they receive less grant-in-aid funds than other States, the fees DOT collects in excess of its grant-in-aid expenditures go to subsidize the enforcement programs of other States.

This alleged inequity arose because in fiscal year 1986 each pipeline operator was assessed a pro rata share, based on mileage, of DOT's total gas or liquid program costs, including total State grant-in-aid costs. Thus, in South Carolina, for example, which elects not to receive grant-in-aid funds, intrastate gas operators may have paid for some small portion of DOT's total gas program costs that were not actually incurred in South Carolina. This situation would have been minimized, of course, had South Carolina accepted the grant-in-aid funds that were available to it.

RSPA believes, however, that the Reconciliation Act does not allow the fee schedule to be established in relation to State-by-State grant-in-aid expenditures. The Act tightly controls RSPA's discretion in setting fees. Fees must be based on miles, volume-miles, or revenue, and in "consideration of the allocation of departmental resources." This last control on RSPA's discretion allows higher fees for facilities that demand a disproportionate share of DOT resources and allocation according to whether costs are due to gas or liquid lines. However, it would greatly expand the intent of this provision to establish fees on the basis of grants to State agencies.

No doubt more grant money is allocated to some States than others, but State sharing of Federal program costs is inherent in the Federal system of government. Any attempt to introduce State based expenditures into the fee schedules would require complex formulations that would only serve parochial not Federal interests. Moreover, it would require mileage or other data on a State basis, which is not available except through further industrial inquiries. In enacting user fees, Congress did not intend any formulation that would be unduly burdensome to administer. In view of these considerations and the controls

on discretion, RSPA has not changed its assessment policy to allocate fees according to State grant-in-aid allocations.

Mileage as Fee Basis

About 30 percent of the commenters objected to pipeline mileage as the basis for assessing fees. There were two main arguments raised against using mileage as the fee basis: (1) Volume-miles is a more accurate indicator of the pipeline "usage" for which fees are assessed. (2) Mileage alone does not reflect DOT's enforcement expenditures which are focused more on pipelines of large capacity in populated areas, than on long, low pressure, small diameter lines in slightly populated areas.

RSPA recognizes there are good arguments in favor of using volume-miles rather than mileage as an assessment basis. However, in determining an appropriate assessment basis, RSPA favors pipeline mileage because it is simple to administer and serves as an indication of the allocation of resources. In RSPA's experience, long pipelines of small diameter require just as much if not more enforcement effort than shorter pipelines of large diameter. Furthermore, mileage was supported by the trade associations representing the industry that commented on the notice. Therefore, RSPA continues to believe that mileage is the best method for assessments, and will use mileage for the fiscal year 1987 fee assessments.

Administrative Procedure

A few commenters argued that the administrative procedure by which the user fee schedule was adopted was improper. These commenters objected to the lack of a comment period in advance of establishment of the fee schedule. RSPA regrets that because of the relatively short time between enactment of the Reconciliation Act (April

7, 1986) and the statutory deadline by which RSPA had to collect pipeline mileage data and assess and collect fees (September 30, 1986), it was impracticable to permit public participation in the development of the fee assessment and collection policies for fiscal year 1986. It was decided, however, to announce the fee assessment and collection policies in the **Federal Register** before formal assessment notices were mailed, and to request comments that would be considered for future fiscal year assessments. A comment period in advance of assessment was not required by the Reconciliation Act, and RSPA believes that publication of the July 16 **Federal Register** notice satisfied all legal obligations under the Administrative Procedure Act for publication of statements of agency policy and interpretation developed to implement the pipeline user fee provisions of the reconciliation Act.

Jointly Owned Pipelines

One of the commenters requested that jointly owned (or leased), or partnership pipelines, with undivided interests, be assessed only once. After payment of the fee, its cost would then be shared by agreement among the individual owners. RSPA did not deliberately assess a single pipeline more than once. But, this result could have occurred if the same pipeline was reported by each of the joint owners in annual reports submitted under Part 191 or in response to the mileage inquiries RSPA made last summer. Joint operators in this situation who believe they were overcharged for fiscal year 1986 may request an adjustment. To prevent any similar overcharges for fiscal year 1987, RSPA suggests that the operators involved notify RSPA as soon as possible which of them is to pay the fee. RSPA will th n delete the overlapping mileage from its calculation of assessment per mile.

Method of payment

One commenter remarked that RSPA's policy of requiring certified checks or money orders within 30 days of assessment was too burdensome. The 30-day period was needed in 1986 to meet the Congressional intent that collections be made in the same fiscal year as costs incurred. Since this should not cause a problem in 1987, RSPA will allow operators at least 60 days after assessment before payment is due and interest charges begin to run. Also, upon further consideration, RSPA believes that payment by personal or corporate check is acceptable, and will be allowed in 1987 as an alternative to certified checks or money orders.

Hearing

Several operators requested an opportunity to meet with RSPA to discuss the arguments they made against the user fee policies. These requests have not been granted because the issues raised were not unusual, and adequate non-conflicting information germane to the issues was available from other sources without holding an individual or public hearing.

Fiscal year 1987 Assessments and Collection Procedures

In consideration of the foregoing, RSPA has adopted the 1986 fee schedule for use in fiscal year 1987 and later years, with the exception that the amounts actually assessed will be based on fiscal year appropriations instead of projected total program costs.

Mileage data for gas transmission lines will continue to be taken from the calendar year annual reports. For liquid pipelines, however, the mileage collected in the summer of 1986 will be used until updated mileage information be-

comes available through establishment of an annual report requirement, which will be proposed next year.

The LNG assessments will be the same, but may vary proportionately in future years as expenditures changes.

The procedures for collecting fees will not change in 1987 except with regard to the payment method, as noted above, and in making necessary adjustments. Adjustments for mileage discrepancies will be made by subtracting the amount of recognized overcharge from the amount due or by remitting any overpayment, instead of making a deduction from the subsequent fiscal year assessment. However, if at the end of a fiscal year the actual program costs are less than the fiscal year assessments based on appropriations, the difference will be applied as a credit to reduce the next year's assessments.

The assessments for fiscal year 1987 should be mailed in February 1987. Mailings in future years will depend on the timing of fiscal year appropriations, but should not be sooner than February of the fiscal year concerned.

Issued in Washington, DC on December 22, 1986.

Robert L. Paullin, *Director, Office of Pipeline Safety.*

Supreme Court of the United States

No. 87-2098

JAMES H. BURNLEY, IV, SECRETARY OF TRANSPORTATION, APPELLANT

v.

MID-AMERICA PIPELINE COMPANY

APPEAL from the United States District Court for the Northern District of Oklahoma. The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

OCTOBER 3, 1988

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